

**July 25, 2007 DRAFT**

Billing Code 4310-55-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Intent to Conduct Public Scoping and Prepare an Environmental Impact Report/Environmental Impact Statement (EIR/EIS) Regarding the Bay Delta Conservation Plan (BDCP) for the Sacramento-San Joaquin Delta, California.

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Department of Commerce and Fish and Wildlife Service (FWS), Interior.

ACTION: Notice of intent.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), we, NMFS

and FWS (Services), advise the public of our intent to gather information necessary to prepare a joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on the Bay Delta Conservation Plan (BDCP). The BDCP is being prepared through a unique collaboration of state, federal and local agencies, under Section 10 (a)(1)(B) of the Federal Endangered Species Act of 1973, as amended (Act). The California Department of Water Resources (DWR) intends to apply for Incidental Take Permits (ITP) from the Services based upon the BDCP in 2009 according to the planning schedule. At the same time, the Services would provide Biological Opinions and Incidental Take Statements (ITS) to the Bureau of Reclamation (Reclamation) for their participation and implementation of the BDCP. The BDCP is also intended to meet the requirements of the California Natural Community Conservation Planning Act, California Fish and Game (CDFG) Code Section 2800 et seq. or Section 2081 of the California Endangered Species Act, California Fish and Game Code 2050 et. Seq. These incidental take authorizations would allow the incidental take of threatened and endangered species resulting from certain covered activities that will be identified through the planning process , associated with water operations of the California State Water Project, as operated by DWR, and the Central Valley Project, as operated by Reclamation.

**Comment [MMG1]:** I move this sentence because I thought the paragraph made more sense when we keep all of the discussion of federal take permits together and then discuss the state permitting process.

The Services provide this notice to (1) briefly describe the anticipated proposed action and the BDCP planning activities now underway to help develop that proposed action; (2) advise other Federal and State agencies, affected Tribes, and the public of our intent to prepare an EIR/EIS; (3) announce the initiation of early public scoping; and (4)

obtain suggestions and information on the scope of issues to be included in the EIR/EIS.

Written comments should be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments and requests for information related to the preparation of the EIR/EIS should be sent [INSERT CONTACTS FOR FWS AND NMFS]. Comments may be submitted electronically to [INSERT EMAIL]. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: [INSERT NAME AND PHONE FOR NMFS AND FWS CONTACTS].

SUPPLEMENTARY INFORMATION:

Proposed Action

The California Department of Water Resources (DWR) intends to apply for Incidental Take Permits (ITP) from the Services based upon the BDCP in 2009 according to the planning schedule. At the same time, the Services would provide Biological Opinions and Incidental Take Statements (ITS) to Reclamation for their participation and implementation of the BDCP. These incidental take authorizations would allow the

incidental take of threatened and endangered species resulting from certain covered activities that will be identified through the planning process and are associated with water operations of the California State Water Project, as operated by DWR, and the Central Valley Project, as operated by Reclamation.

The covered activities may include, but are not necessarily limited to, existing or new activities related to:

- Conveyance elements of the State Water Project (SWP) and Central Valley Project (CVP)
- Operational activities, including emergency preparedness, of the SWP and CVP
- Operational activities related to water transfers involving Water Contractors or to serve environmental programs
- Maintenance of the SWP, CVP, and other Potentially Regulated Entities' facilities
- Facility improvements of the SWP and CVP
- Ongoing operation of and recurrent and future projects related to Other Delta Water Users
- Projects designed to improve salinity conditions
- Conservation measures included in the BDCP, including, but not limited to, adaptive habitat management, restoration, enhancement and monitoring activities

Planning Agreement, para. 7.5, available at

[http://resources.ca.gov/bdcp/docs/BDCP\\_Planning\\_Agreement\\_revised\\_4.23.2007.pdf](http://resources.ca.gov/bdcp/docs/BDCP_Planning_Agreement_revised_4.23.2007.pdf).

DWR, Reclamation, and other parties reached Planning Agreement in October 2006 as amended April 2007, to guide the BDCP process.

#### Planning Process

DWR and Reclamation, along with the Metropolitan Water District of Southern California (MWD), the Kern County Water Agency (KCWA), the Santa Clara Valley Water District (SCVWD), Alameda County Flood Control and Water Conservation District, Zone 7 (Zone 7), the San Luis & Delta-Mendota Water Authority (SLDMWA), the Westlands Water District (WWD), and Mirant Delta (known collectively as the “Potentially Regulated Entities” or PREs) are preparing the BDCP for their existing and proposed new water management operations in the Sacramento-San Joaquin Delta (Delta). It is the goal of the PREs that the BDCP will (1) satisfy the requirements of Section 10(a)(1)(B) of the Act for non-Federal PREs and result in the issuance of ITPs from the Services to certain of the PREs, (2) be used in a concurrent consultation with other federal agencies pursuant to Section 7 of the Act, resulting in the issuance of ITSs from the Services to certain of the PREs (3) satisfy the requirements for an ITP under the California ESA, either pursuant to the Natural Community Conservation Plan Act (NCCPA), Section 2835 of the Fish and Game Code or Section 2081 of the Fish and Game Code.

The planning efforts for the BDCP are in its preliminary stages. The BDCP is being prepared with the cooperation of the Services, the California Resources Agency,

CDFG, the PREs, and various stakeholders, including among others, the Nature Conservancy, Environmental Defense, Defenders of Wildlife, the California Farm Bureau, the Natural Heritage Institute, and American Rivers. All of these agencies and organizations are members of a Steering Committee that will guide the preparation of the BDCP. The Services are participating in the Steering Committee's efforts on an ex officio basis, providing technical input and guidance in support of the Steering Committee's efforts. The participants are undertaking these planning efforts pursuant to the Planning Agreement. Members of the public interested in participating in the BDCP process or interested in having access to information associated with the effort are encouraged to visit the BDCP component of the California Resources Agency's website: <http://resources.ca.gov/bdcp/>. This website provides open access to comprehensive documentation of the planning process, and a detailed schedule of past and future planning activities. The following describes preliminary information identified by the Steering Committee for consideration in the BDCP development.

#### *Geographic Scope*

The planning area for the BDCP will consist of the aquatic ecosystems within the Statutory Delta (California Water Code Section 12220), which includes parts of Yolo, Solano, Contra Costa, San Joaquin, and Sacramento Counties. However, it may be necessary for the BDCP to include conservation actions outside the Statutory Delta that advance the goals and objectives of the BDCP, including as appropriate, conservation actions in the Suisun Marsh, Suisun Bay, and areas upstream of the Delta. See Planning Agreement, para. 5.

*Covered Species* Species that are intended to be the initial focus of the BDCP include aquatic species such as: Central Valley steelhead (*Oncorhynchus mykiss*), Central Valley Chinook salmon (*Oncorhynchus tshawytscha*) (spring run and fall/late-fall runs), Sacramento River Chinook salmon (winter run), Delta smelt (*Hypomesus transpacificus*), green sturgeon (*Acipenser medirostris*), white sturgeon (*Acipenser transmontanus*), splittail (*Pogonichthys macrolepidotus*), longfin smelt (*Spirinchus thaleichthys*). Other species that will be considered for inclusion in the BDCP include Swainson's hawk (*Buteo swainsoni*), bank swallow (*Riparia riparia*), giant garter snake (*Thamnophis gigas*), and valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*). See Planning Agreement, para. 6.1.1. This list identifies the species that will be evaluated for inclusion in the BDCP as proposed covered species, but the list may vary or change as the planning process progresses. The participants anticipate that species may be added or removed from the list once more is learned about the nature of the covered activities and the impact of covered activities on native species within the planning area.

#### *Planning Goals*

The BDCP will include goals and objectives for the management of Covered Activities and conservation of Covered Species. As proposed in the Planning Agreement (para. 3), the planning goals include: 1. Provide for the conservation and management of covered species within the planning area;

2. Preserve, restore and enhance aquatic, riparian and associated terrestrial natural communities and ecosystems that support covered species within the planning area through conservation partnerships;
3. Allow for projects that restore and protect water supply, water quality, ecosystem, and ecosystem health to proceed within a stable regulatory framework;
4. Provide a means to implement covered activities in a manner that complies with applicable State and federal fish and wildlife protection laws, including CESA and FESA, and other environmental laws, including the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA);
5. Provide a basis for permits necessary to lawfully take covered species;
6. Provide a comprehensive means to coordinate and standardize mitigation and compensation requirements for covered activities within the planning area;
7. Provide a less costly, more efficient project review process which results in greater conservation values than project-by-project, species-by-species review; and
8. Provide clear expectations and regulatory assurances regarding covered activities occurring within the planning area.



## Statutory Authority

Section 9 of the Act (16 U.S.C. 1538) and implementing regulations (50 CFR 17.21(c), 17.31(a)) prohibit the “taking or animal species listed as endangered or threatened. The term “take” is defined under the Act to mean harass, harm, pursue, hunt, shoot, wound kill, trap, capture or collect, or attempt to engage in any such conduct (16 U.S.C. 1532 (10)). “Harm” is defined by FWS regulation to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding and sheltering (50 CFR 17.3). NMFS’ definition of harm includes significant habitat modification of degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, spawning, migrating, rearing and sheltering (64 FR 60727, November 8, 1999).

Section 7 of the Act outlines the procedures for federal interagency cooperation to conserve federally listed species and designated critical habitats (U.S.C. 1531 et seq.) Section 7(a)(1) of the Act directs the Secretaries of Interior and Commerce (Secretaries) to review other programs administered by them and utilize such programs to further the purposes of the Act. It also directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of species listed pursuant to the Act. Section 7(a)(2) states that each Federal agency shall, in consultation with the Secretaries, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the

destruction of adverse modification of designated critical habitat. Sections 7(b)(4) and 7(o)(2) of the Act allow for taking of listed species that is incidental and not an intended part of a federal action if such taking is in compliance with the terms and conditions of an incidental take statement provided by the Services.

Section 10 of the Act and implementing regulations provide for the issuance of incidental take permits (ITPs) to non-federal applicants to authorize incidental take of endangered and threatened species (16 U.S.C. 1539(a); 50 CFR 17.22, 17.32(b)). Any proposed take must be incidental to an otherwise lawful activity, must not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and must be minimized and mitigated to the maximum extent practicable. In addition, an applicant must prepare a Habitat Conservation Plan (HCP) describing the impact that will likely result from such taking, a plan for minimizing and mitigating the impacts of such incidental take, the funding available to implement the plan, alternatives to such taking, and the reasons such alternatives are not being implemented.

NEPA (42 U.S.C. 4321 et seq.) requires that Federal agencies conduct an environmental analysis of their proposed actions to determine if the actions may significantly affect the human environment. Under NEPA and its implementing regulations (40 CFR 1500 et seq.; INSERT CITATION TO USFWS and NMFS NEPA REGULATIONS), a reasonable range of alternatives to the proposed action are developed and considered in the Services' EIR/EIS. Alternatives considered for analysis in an EIR/EIS may include: variations in the scope or types of covered activities;

variations in the location, amount and types of conservation measures, timing of project activities; variations in permit duration; or a combination of these or other elements. In addition, an EIR/EIS will identify potentially significant direct, indirect, and cumulative effects, and possible mitigation for those significant effects, on biological resources, land use, air quality, water quality, water resources, socioeconomics, environmental justice, cultural resources, and other environmental issues that could occur with the implementation of the proposed action and alternatives.

#### Schedule

The schedule for this EIR/EIS depends upon the development of the draft BDCP, which is expected to occur in by early 2009. We will publish additional notices about the proposed action and public participation once the elements of the comprehensive plan are developed.

#### Request for Comments

Environmental review of the EIR/EIS will be conducted in accordance with the requirements of NEPA (42 U.S.C. 4321 et. seq.), its implementing regulations (40 CFR parts 1500-1508), other applicable regulations, and the Services' procedures for compliance with those regulations; and according to the requirements of CEQA (California Public Resources Code Section 21000 et. seq.) and the State CEQA Guidelines (14 California Code of Regulations 15000 et. seq.). This notice is being

furnished in accordance with 40 CFR 1501.7 and 1508.22 to obtain suggestions and information from other agencies and the public on the scope of issues and alternatives that will be addressed in the EIR/EIS. The primary purpose of the scoping process is to identify important issues raised by the public related to the issuance of ITPs for the BDCP. Written comments from interested parties are invited to ensure that the full range of issues related to the development of the BDCP and issuance of the ITPs are identified. Comments during this stage of the scoping process will only be accepted in written form. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

Our practice is to make comments, including names, home addresses, home phone numbers, and email addresses of respondents, available for public review. Individual respondents may request that we withhold their names and /or homes addresses, etc., but if you wish us to consider withholding this information you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Reasonable Accommodation

Information regarding this proposed action is available in alternative formats upon request.

Dated: \_\_\_\_\_

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Deputy Manager

California/Nevada Operations Office

Sacramento, California

\_\_\_\_\_  
Regional Administrator

[Insert information about RA]